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that a more concrete statute than the present one be enacted. The Indiana statute might serve as a guide in drafting such a statute, for that statute seems to clearly achieve the scope of review desired by the Ohio General Assembly, and its terms have apparently given little trouble to the courts.

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Implied Warranties of Quality in Ohio

IN CASES in which harm results to the buyer or to someone else from defects in goods that have been sold, the injury frequently occurs under circumstances in which negligence of the seller cannot be proved. Often the complainant can recover from the seller, if he can recover at all, only by proving a breach of an implied warranty of quality. These warranties are set forth in the Uniform Sales Act, Section 15, sub-sections 1[1] and 2.[2] This note is concerned primarily with judicial interpretations in Ohio of these sub-sections,[3] with particular reference to their effect on the prior common law.

THE LAW BEFORE THE SALES ACT

The early common law rule as to all sales was *caveat emptor.* Under this doctrine the seller was not liable for defects of any kind in the thing sold unless there was an express warranty or fraud by the seller. Even in the case of an express warranty, if the defects were obvious the warranty was not binding.[4] These early common law cases did not recognize any liability founded on an implied warranty.[5]

By the middle of the nineteenth century, however, the courts recognized the harshness of applying the doctrine of *caveat emptor,* in the absence of fraud or an express warranty, in sales by a manufacturer or grower. The first departure was to hold such sellers to an implied warranty of merchantability in a sale by description.[6] Under this warranty the manufacturer or grower was liable to his vendee for damages resulting from latent defects

[1] "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

[2] "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

[3] OHIO GEN. CODE, §§ 8395(1), 8395(2).

[4] Bayly v. Merrell, 2 Cro. Jac. 386.

[5] Parkinson v. Lee, 2 East. 315 (1802).

[6] Laing v. Fidgeon, 6 Taunt. 108 (1815); Gardner v. Gray, 4 Camp. 144 (1815).

rendering the goods unmerchantable which arose out of the processes of production.[7] Some jurisdictions, including Ohio, extended his liability to damages resulting from latent defects in the materials used in production which made the goods unmerchantable.[8]

The implied warranty of merchantability did not apply to sales by vendors who were not manufacturers or growers on the theory that generally the goods sold were equally accessible for inspection by both parties, and their quality equally unknown to both.[9]

During the same period in which the implied warranty of merchantability developed, the courts also recognized a common law implied warranty of fitness for use. This warranty imposed on all sellers, whether grower or manufacturer, an implied warranty of fitness for use when the buyer disclosed to the seller his intention to use the goods for a special purpose, and the buyer then relied on the seller's selection of goods for that purpose. However, special purpose under this warranty was limited by many courts to something other than an ordinary use.[10]

The implied warranty of fitness for use was merely an extension of the early common law express warranty. It was regarded by some courts as an express warranty by conduct instead of words.[11]

Effect of the Uniform Sales Act

Under the Uniform Sales Act, Section 15(2), the implied warranty of merchantability[12] by a manufacturer or grower has been extended to other sellers, even when such sellers do not have the means of ascertaining the presence of latent defects in the goods they sell.[13] The reason for this change in theory and policy is succinctly set forth by Professor Vold as follows:

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[7] Hoe v. Sanborn, 21 N. Y. 552 (1860).

[8] "If they have failed, through defect of material procured by themselves, or of workmanship, their contract is broken, whether such defects be latent or visible, and however honest their intentions may have been." Rodgers v. Niles, 11 Ohio St. 48, 58 (1860).

[9] Hargous v. Stone, 5 N.Y. 73 (1851).

[10] Titley v. Enterprise Store Co., 127 Ill. 457, 20 N.E. 71 (1889); Thompson v. Libby, 35 Minn. 443, 29 N.W 150 (1886); Jones Store Co. v. Shain, 352 Mo. 630, 179 S.W.2d 19 (1944).

[11] Byers v. Chapin, 28 Ohio St. 300 (1876).

[12] The leading case defining the term "merchantability" as used in this sub-section of the Sales Act is McNeil & Higgins Co. v. Czarnikov-Rienda Co., 274 Fed. 397 (S.D.N.Y. 1921). Two recent illustrations of non-merchantability are: DiVello v. Gardner Machine Co., 46 Ohio Op. 161, 102 N.E.2d 289 (1951) (a grinding wheel which disintegrated in ordinary use); Stott v. Johnston, 219 P.2d 845 (Cal. App. 1950), *Aff'd*, 36 Cal. 2d 864, 229 P.2d 348 (1951) (paint which peeled off shortly after application).

[13] Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1936).

> Placing the obligation upon dealers as well as upon manufacturers provides a more effective protection to buyers, and has a strong tendency to improve marketing conditions regarding the quality of goods. If immediate sellers are thus required in the first instance to sustain the burden if goods are defective, they can in turn resort to their previous sellers in the chain of transfers, thus eventually reaching the original producer, grower, or manufacturer, whose conduct is responsible for the presence of the injurious defect in the goods.[14]

The judiciary in construing the Uniform Sales Act Section 15(1), have extended the implied warranty of fitness for use beyond the common law concept of many courts by applying it even to cases of purchases for ordinary use. The courts which have considered the problem under the Sales Act have uniformly held that when the goods are generally used for a certain purpose and the buyer purchases them for that purpose, the mere purchase of the goods constitutes an implied communication to the seller of the particular purpose for which the buyer requires the goods.[15]

There is very little Ohio authority interpreting this sub-section of the Sales Act. The Ohio cases, however, are in accord with these general principles. In the case of *Sharpsville Boiler Works Co. v. Queen City Petroleum Products Co.*,[16] which involved the sale of tanks for the storage of gasoline, which tanks proved leaky on use, the court held:

> Section 8395, General Code, on implied warranty, must be read into the contract. The seller knew the purpose for which the tanks were purchased and were to be used, and there follows an implied warranty that they would be reasonably fit for the purpose for which they were purchased Under the implied warranty if the tanks were unfit, or had latent defects, the seller would be liable.[17]

Thus far the Ohio courts have not been confronted with the issue of applying the warranty when there is only partial reliance on the seller's skill and judgment. One jurisdiction, in a typical over-the-counter sale, has imposed an implied warranty of fitness for use when the buyer partially

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[14] VOLD, SALES 454 (1931) It is to be noted that the common law rule of confining the warranty of merchantability to manufacturers or growers made the warranty unavailable to the ultimate purchaser under modern marketing through middlemen. The general rule is that there must be privity of contract to recover for breach of warranty. Chanin v. Chevrolet Motor Co., 89 F.2d 889 (1937); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946); Finko v. Viking Refrigerators, 235 Mo. App. 679, 147 S.W.2d 124 (1941); Pearlman v. Garrod Shoe Co., 276 N.Y. 172, 11 N.E.2d 718 (1937); Jourdan v. Brouier, 56 Ohio L. Abs. (1950).

[15] Smith v. Burdine's, Inc., 144 Fla. 500, 198 So. 223 (1940); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939); Graham v. Jordan Marsh Co., 319 Mass. 690, 67 N.E.2d 404 (1946); Grant v. Australian Knitting Mills, Ltd., [1936] A.C. 85.

[16] 23 Ohio App. 319, 156 N.E. 149 (1927).

[17] *Id.* at 321, 156 N.E. at 149. *Accord,* Kolberg v. Central Fruit & Grocery Co., 37 Ohio App. 64, 174 N.E. 144 (1930).

relied on the seller's skill and judgment even though the buyer made the final selection himself.[18]

The seller's implied warranty of fitness for use is not the equivalent of making the seller an insurer of the fitness for use of the goods sold. The buyer may recover his damages for breach of this warranty only when the goods sold prove to be not reasonably fit for the purpose for which they were selected.[19] Most of the modern cases defining the term "reasonable fitness" have involved an allergic or supersensitive condition of the buyer to some chemical contained in the goods. These cases have generally held that the warranty applies as to the allergic buyer,[20] but not as to the supersensitive buyer.[21] The Ohio courts have not yet been confronted with the issue of the allergic or supersensitive buyer.

THE "SEALED PACKAGE" PROBLEM

The first consideration of this problem by the Ohio Supreme Court subsequent to the enactment of the Uniform Sales Act was in the case of *McMurray v. Vaughn's Seed Store*.[22] In that case, the plaintiff sued on an account. The defendant attempted a set-off by alleging damages resulting from the plaintiff's negligence in a prior and unrelated transaction. The court rejected this defense, held that a claim *ex contractu* cannot be set off by an action *ex delictu* when there is no relationship between the claims, and then went on to state:

> The proposition is sustained by reason and authority that where a dealer sells an article of merchandise in the original package as it comes from the manufacturer and the customer buys it knowing there has been no inspection by the dealer, there is no implied warranty.[23]

Nowhere in the opinion of the court is the Sales Act mentioned.

This pronouncement by the Ohio Supreme Court, although *obiter*, was incorporated into the syllabi of the opinion.[24] The authorities cited by the

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[18] Kuriss v. Conrad & Co., 312 Mass. 670, 46 N.E.2d 12 (1942).

[19] Cavanagh v. F. W Woolworth Co., 308 Mass. 423, 32 N.E.2d 256 (1941) (the mere "popping" of a rubber stopper from a bottle containing a carbonated beverage did not show that the stopper was unable to withstand gas pressure up to a reasonable extent, nor that the stopper was not reasonably fit for the particular purpose for which it was used).

[20] Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E.2d 697 (1939); Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A.2d 73 (1939).

[21] Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A.2d 502 (1941) (as a matter of law there is no breach of the implied warranty of reasonable fitness when the injury is caused by some individual supersensitivity of the plaintiff). See Comment, 5 VAND. L. REV. 212, 215 (1952).

[22] 117 Ohio St. 236, 157 N.E. 567 (1927).

[23] *Id.* at 245, 157 N.E. at 570.

[24] McMurray v. Vaughn's Seed Store, 117 Ohio St. 236, 157 N.E. 567 (1927), syllabus four.

court in support of the above dictum either dealt only with the question of negligence, and were therefore inapplicable in considering warranty liability or were rendered in the particular jurisdiction before the adoption of the Uniform Sales Act. The quoted dictum postulates the common law rule of *caveat emptor,* but it is obviously inconsistent with the clear language of the Sales Act, which contains no such limitation on a seller's warranty liability.[25]

The issue of whether the implied warranty of merchantability, as defined by the Uniform Sales Act, is applicable to a retail sale of an article of merchandise in the original package as it comes from the third-party manufacturer was squarely before the court of appeals in the case of *Goljatowska v. Fred W Albrecht Co.*[26] In that case the plaintiff was injured by biting on an iron bolt nut contained in a sealed can of food sold to him by the defendant, a retail grocer. The defendant contended that under the rule of the *McMurray* case he was not liable. The court, however, asserted that the dictum in the McMurray case was not binding,[27] and adopted as the better view the doctrine of *Ryan v. Progressive Grocery Stores, Inc.*[28] This doctrine recognizes the liability of a dealer for breach of the implied warranty of merchantability when food is purchased in a sealed package for consumption off the premises of the seller.

The first Ohio non-food case involving the same issue was *Dow Drug Co. v. Nieman.*[29] The defendant drug store sold to the plaintiff a cigar wrapped in cellophane exactly as the drug store had received the goods from the distributor. A firecracker, negligently inserted in the cigar by the manufacturer unknown to the defendant seller, exploded in the plaintiff's face. The court asserted that the Uniform Sales Act, Section 15(2) applies to retailers whether or not the goods are in a sealed container, and the dictum in the *McMurray* case, asserted as a defense, was repudiated. The *Goljatowska* case was cited with approval, and the court then went on to say:

> No distinction is drawn in the application of this section of the Uniform Sales Act between sales of food and sales of other articles of personal property.[30]

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[25] See note 2 *supra.*

[26] 17 Ohio L. Abs. 294 (1934).

[27] The court cited Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 (1934) which held that when *obiter* creeps into a syllabus it must be so recognized and so considered.

[28] 255 N.Y. 388, 175 N.E. 105 (1931). *Accord,* Martin v. Great Atlantic & Pacific Tea Co., 301 Ky. 429, 192 S.W.2d 201 (1946); Brussels v. Grand Union Co., 14 N.J. Misc. 751, 187 Atl. 582 (1936); D'Onofrio v. First Nat. Stores, 68 R.I. 144, 26 A.2d 758 (1942).

[29] 57 Ohio App. 190, 13 N.E.2d 130 (1936).

[30] *Id.* at 198, 13 N.E.2d at 134.

The effect of the *Goljatowska* and *Dow Drug Co.* cases was to align Ohio law with that of other jurisdictions which have considered the "sealed package" issue as affected by the Sales Act.[31] But the issue was again clouded when the Ohio Supreme Court considered the problem in the case of *Sicard v. Roux Distributing Co.*[32] In that case the plaintiff, a beautician, sustained a skin injury in applying to a customer's hair a shampoo purchased from the defendant in sealed packages. The shampoo was found to be inherently dangerous because it contained an excessive quantity of poison generally harmful to human skin. There was evidence from which the jury could reasonably conclude that the defendant knew, or should have known, of the presence of this poison. The defendant asserted the dictum of the *McMurray* case as a defense. The supreme court did not disavow this dictum, nor did the court mention the *Goljatowska* or *Dow Drug Co.* cases. Instead, the court distinguished the *McMurray* dictum as follows:

> The instant case is readily distinguishable from that case. There the product sold by the dealer was shipped direct to the buyer by the manufacturer, the dealer not having any opportunity for inspection. Moreover the article sold was shredded cattle manure, a product not inherently dangerous as in the instant case. The defendant here was not a mere retailer who sold the hair dye to the plaintiff in package form.[33]

It is not clear from this language whether the Ohio Supreme Court still considers the *McMurray* dictum as the law of Ohio in a fact situation coming within its scope.

The most recent Ohio case to consider the problem is *Ouzts v. Maloney*,[34] also an Ohio Supreme Court decision. There was a sale by sample to the plaintiff of a packaged food product. The defendant seller was a distributor who assumed no duties with regard to the manufacture of the product, the labeling of the package, or the manner of packaging. The samples delivered to the plaintiff for inspection were packaged exactly as the plaintiff expected to resell the goods to the buying public. The plaintiff did not place his order until after he had thoroughly tested the sample, and had ample opportunity to inspect the container and the descriptive labeling. After the plaintiff accepted the goods, a shipment was seized by agents of the United States Food and Drug Administration for a violation of the Pure Food and Drug Act regarding misbranding of foods in interstate commerce, and thereafter the goods seized were ordered destroyed. The plaintiff contended that his inability to resell the goods in interstate commerce rendered them unmerchantable.[35] The court of appeals affirmed a directed verdict for the defendant on the strength of the *McMurray* dictum, holding:

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[31] See note 28, *supra.*

[32] 133 Ohio St. 291, 13 N.E.2d 250 (1938).

[33] *Id.* at 300, 13 N.E.2d at 254.

[34] 157 Ohio St. 537, 106 N.E.2d 561 (1952).

> All of the merchandise was shipped by the manufacturer and not by the defendant-appellee and the article was not inherently dangerous. It is obvious that both of the distinctions made in *Sickard* [sic] *v. Distributing Company*, supra are applicable to the case at bar. The appellant cites the case of *Dow Drug Company v. Nieman* and *Goljatowska v. Albrecht* but in each of these cases the purchaser was the ultimate consumer and in each he was injured personally by the article he purchased.[35]

On appeal the Ohio Supreme Court did not approve or disapprove this statement. Instead it affirmed the directed verdict for the defendant on the theory that the sale was by sample and there was no breach of warranty because the delivered goods conformed to the sample. There is nothing in the language of the Sales Act, however, to justify the conclusion of the court of appeals. The Uniform Sales Act, Section 15(2), does not purport to limit the class of purchasers who are entitled to rely on the warranty to "ultimate consumers," nor is the type of damages recoverable for the breach of the warranty limited to personal injuries.[37]

Sales by sample are sales by description — the sample being part of the description.[38] The implied warranty of merchantability applies to sales by sample except as to defects apparent on reasonable examination of the sample.[39] Since the buyer in the *Ouzts* case was not in fact aware of the misbranding laws, and the ordinary merchant without such knowledge could not have discovered the defect, the result reached can only be justified under the Sales Act on the concurring theory of Judge Taft that the buyer is conclusively presumed to know the law and therefore deemed to have discovered the defect on inspection of the sample.[40] It is clear from the language of the Sales Act that a mere delivery of goods conforming to the sample does not of itself render the warranty of merchantability inoperative.

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[35] The plaintiff relied on Myers v. Malone & Hyde, Inc., 173 F.2d 291 (1949) which held that misbranding of the container by the seller in violation of the federal pure food and drug laws was a breach of the implied warranty of merchantability in a sale by description. It is generally held that goods sold may be unmerchantable because of defects in the container even though there are no defects in the goods themselves. Poulos v. Coca Cola Bottling Co. of Boston, 322 Mass. 386, 77 N.E.2d 405 (1948); Mahoney v. Shaker Square Beverages, Inc., 46 Ohio Op. 250, 102 N.E.2d 281 (1951).

[36] Ouzts v. Maloney, 63 Ohio L. Abs. 272, 275 (1951).

[37] See note 2 *supra*.

[38] VOLD, SALES 452 (1931).

[39] "If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample." UNIFORM SALES ACT, § 16(c). OHIO GEN. CODE § 8396 (c).

[40] See Ouzts v. Maloney, 157 Ohio St. 537, 547, 106 N.E.2d 561, 566 (1952) (concurring opinion).